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No. 04-373

IN THE

# Supreme Court of the United States

STATE OF MARYLAND,

*Petitioner*,

*vs.*

LEEANDER JEROME BLAKE,

*Respondent.*

**On Writ of Certiorari to the Court of Appeals of Maryland**

## MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Does the rule of *Elstad* v. *Oregon* apply to an alleged violation of *Edwards* v. *Arizona*?

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Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation* respectfully moves for leave to file a brief *amicus curiae* out of time, and to file the accompanying brief *amicus curiae* in support of the petitioner.

*Amicus* regrets missing the deadline for filing. *Amicus* was prepared to file the brief on time for the original deadline for filing June 2, 2005. Upon finding out that this Court had extended the time for filing, *amicus* chose to further review the brief. Counsel of record did not update the calendering of the due date for filing the brief, causing it to be picked up from the printer one day late. Counsel of record apologizes for this failure. *Amicus* seeks leave to file its brief one day after the

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* This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

June 9, 2005 deadline.** Counsel for both parties have consented to filing the brief.

## INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves *Edwards* v. *Arizona*, 451 U. S. 477 (1981), an extension of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). *Edwards* operates at the outer edge of the Fifth Amendment, suppressing both voluntary waivers and voluntary confessions. Applying the rule of *Oregon* v. *Elstad*, 470 U. S. 298 (1985) will ameliorate some of *Edwards*' harsh consequences to public safety without undermining its protection of the *Miranda* rule. The Maryland Court of Appeals' refusal to apply *Elstad* to *Edwards* needlessly increases *Edwards*' cost to society. Applying *Elstad* to *Edwards* will result in the admission of voluntary confessions which will lead to the conviction of more guilty criminals, which advances the public safety interests that the CJLF was formed to protect.

June, 2005

Respectfully submitted,

CHARLES L. HOBSON
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*Criminal Justice Legal Foundation*

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** This motion includes an interest of *amicus curiae*, as does the brief. Since deleting the interest of *amicus curiae* from the brief would require its reprinting, *amicus* has chosen to leave it in the brief in order to avoid further delay.

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**BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER**

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## INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves *Edwards* v. *Arizona*, 451 U. S. 477 (1981), an extension of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). *Edwards* operates at the outer edge of the Fifth Amendment, suppressing both voluntary waivers and voluntary

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

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confessions. Applying the *Oregon* v. *Elstad*, 470 U. S. 298 (1985) will ameliorate some of *Edwards*' harsh consequences to public safety without undermining its protection of the *Miranda* rule. The Maryland Court of Appeals' refusal to apply *Elstad* to *Edwards* needlessly increases *Edwards*' cost to society. Applying *Elstad* to *Edwards* will result in the admission of voluntary confessions which will lead to the conviction of more guilty criminals, which advances the public safety interests that the CJLF was formed to protect.

## SUMMARY OF FACTS AND CASE

On September 19, 2002, Straughan Lee Griffin was murdered in front of his home in Annapolis, Maryland. The murderers "shot him in the head, stole his automobile, and ran over his body as they fled from the scene." *Blake* v. *State*, 849 A. 2d 410, 412 (Md. 2004).

Terrence Tolbert was arrested in connection with the crime on October 25, 2003, and implicated the defendant, Leeander Jerome Blake. *Ibid.* The following day, between 4:30 and 5:00 a.m., police arrested Blake at his home. At the time, Blake was wearing boxer shorts, a tank top, and no shoes. He was handcuffed and transported to the Annapolis Police Department, *ibid.*, where he was then taken to a booking room. *Ibid.* In the booking room Detective William Johns, the lead detective in the case, administered the *Miranda*[2] warnings to Blake. *Ibid.* After Blake told the officers that he did not want to speak without a lawyer, he was placed in a holding cell at around 5:25 a.m. See *id.*, at 412-413.

Under Maryland law, Blake was entitled to a copy of his arrest warrant and a statement of his charges. See *id.*, at 413, and n. 3 (quoting Md. Rule 4-212(e)). Detective Johns and Officer Curtis Reese delivered these to Blake at 6:00 a.m. See

2. *Miranda* v. *Arizona*, 384 U. S. 436 (1966).



*id.*, at 413. Johns explained the charges to Blake, telling him that they were serious and that he needed to carefully read the document and understand it. See *ibid.* The statement of charges indicated that he was charged with "first degree murder, second degree murder, armed robbery, armed carjacking, and use of a handgun in a crime of violence." *Ibid.* The charging paper also stated that the penalty for first-degree murder was death, even though Blake was personally not eligible for that punishment under Maryland law, because he was under 18. See *ibid.*

As Detective Johns handed the charging document to Blake and started to leave, Officer Reese appeared and said in a loud and confrontational tone, " 'I bet you want to talk now, huh!' " *Ibid.* Detective Johns was surprised by this statement, and said very loudly within Blake's hearing, " 'No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now.' " *Ibid.* Johns, out of concern for Blake's rights, "told Officer Reese that [Blake] had asked for an attorney and they could not reinitiate any kind of conversation with him." *Ibid.*

Half an hour later, Detective Johns came back to Blake's cell to give him the rest of his clothing, which had been brought to the station by another officer. *Ibid.* As Johns handed Blake the clothing, Blake asked him, " 'I can still talk to you?' " to which Johns responded, " 'Are you saying that you want to talk to me now?' " Blake responded, " 'yes,' " and Johns left the area, returning in a few minutes. *Ibid.* He told Blake that he would have to give Blake the *Miranda* warnings again, and that he would be back in a few minutes. Blake was then taken to the interrogation room, reread his *Miranda* warnings, gave a waiver, agreed to talk without counsel, and made incriminating statements to Detective Johns. See *id.*, at 413-414. He also agreed to take a polygraph exam, where Blake made additional incriminating statements. See *id.*, at 414.

At the suppression hearing, Blake testified that after hearing Officer Reese's statement and seeing that he faced the death

penalty he was scared. *Id.*, at 414. Blake claimed that Johns rather than Blake reinitiated the conversation that led to his interrogation. *Ibid.* When asked why he spoke to Detective Johns after invoking his *Miranda* rights, Blake stated, " 'First it was what Officer Reese said to me "I bet you want to talk now, huh!" I was scared cold. Never went through nothing like this. And I saw my charges and saw I was facing death.' " *Id.*, at 414.

The trial court held that Officer Reese's remark was improper interrogation and, when combined with Blake's youth and the misinformation about the death penalty, invalidated his subsequent waiver, rendering his statements inadmissible under *Miranda* and *Edwards* v. *Arizona*, 451 U. S. 477 (1981). See 849 A. 2d, at 416. The trial court's ruling did not rely on Blake's claim that Detective Johns initiated the conversation that led to the waiver and incriminating statements. See *id.*, at 414-416. The trial court's factual discussion follows Detective Johns' version of events. See App. to Pet. for Cert. 76a; see also *id.*, at 78a (finding Detective Johns' testimony "convincing and truthful").

The state appealed, and the Maryland Court of Special Appeals reversed. See 849 A. 2d, at 416. The Court of Appeals of Maryland granted certiorari "to answer the following question: 'Did the police actions in question constitute the functional equivalent of interrogation?' " *Ibid.* It found that while there was no express questioning after Blake invoked his right to counsel, Officer Reese's comment "amounted to the functional equivalent of interrogation." *Id.*, at 419. The Court also held that Blake did not reinitiate contact with the police in a manner consistent with *Edwards*. While Blake's question " 'I can still talk to you?' might be considered an 'initiation' of contact with the officers in the 'dictionary sense' of the words used in [*Oregon* v. *Bradshaw*, 462 U. S. 1039 (1983)], it could hardly be said that under the circumstances [Blake] initiated the contact as that term is contemplated in the legal sense." *Id.*, at 422. The Maryland high court also ruled that Detective Johns'



remarks following Officer Reese's statement did not "negate the prior unlawful interrogation by Officer Reese" and that the 28-minute period between Reese's remarks and Blake's reinitiation of contact was not long enough to dissipate the taint of the purported *Edwards* violation. See *ibid.* The Court of Appeals reversed the lower court, and reinstated the trial court's order granting the suppression motion. *Id.*, at 243.

This Court granted certiorari on April 15, 2005.

## SUMMARY OF ARGUMENT

The Maryland Court of Appeals improperly compromised public safety because of a simple, immediately corrected mistake by a police officer. Neither *Edwards* v. *Arizona* nor *Miranda* v. *Arizona* supports this unfortunate result.

The *Miranda* rule, which suppresses voluntary as well as involuntary confessions, stretches the Fifth Amendment. Recognizing this, the Court applies *Miranda* pragmatically, balancing the costs and benefits of suppression. This has led to several decisions limiting *Miranda* or creating exceptions to it. These limits on *Miranda* are undiminished by the holding in *Dickerson* v. *United States* that *Miranda* announced a constitutional rule.

As an extension of *Miranda*, there is an even greater need to limit *Edwards*' impact on legitimate law enforcement interests. While *Edwards* may protect *Miranda*'s guarantees, it accomplishes this goal at the cost of suppressing even more voluntary confessions. Therefore it should be at least as susceptible to the same limitations as is *Miranda*.

The limitation on *Miranda* found in *Oregon* v. *Elstad* should apply to any purported *Edwards* violation. *Elstad* recognized that the costs of applying the "fruit of the poisonous tree" doctrine to statements made after a prior statement contrary to *Miranda* were too high and the benefits too low. Since *Miranda* excluded voluntary as well as involuntary

statements, there was no reason to analogize it to the Fourth Amendment exclusionary rule. This reasoning applies equally well to *Edwards* violations.

Since *Miranda* and *Edwards* violations come from different fact patterns, *Elstad* applies somewhat differently to *Edwards*. An *Edwards* violation is typically preceded by a *Miranda* warning. Therefore a new *Miranda* warning cannot "cure" the *Edwards* violation. The key to understanding how *Elstad* applies to *Edwards* is that the suspect's decision to initiate a new conversation effectively "cures" any earlier *Edwards* violation. Applying *Elstad*, an initial *Edwards* violation does not taint a subsequent decision by the suspect to initiate discussion with the police about the crime under investigation.

Blake validly waived his rights to silence and counsel when he initiated the conversation with Detective Johns. *Elstad* applies to any alleged violation by Officer Reese of *Edwards*' limits on questioning. His statement was a simple mistake that was quickly corrected by Detective Johns. The break between this encounter and Blake's decision to initiate the conversation with Detective Johns shows that there was no taint that had to be dissipated before Blake could waive his rights. Since Blake never made a suppressible incriminating statement before making his waiver, the case for the validity of his waiver is arguably stronger than the waiver upheld in *Elstad*. The fact that he was handed a charging paper that accurately listed death as the maximum penalty for first-degree murder does not change the analysis. The charging paper did not reflect the fact that Blake was too young to face the death penalty because it was not intended to address the individual's status at that stage of the proceedings. Since this was not an attempt to trick Blake into waiving his rights, it has no constitutional significance.



## ARGUMENT

"Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose." *Michigan* v. *Tucker*, 417 U. S. 433, 446 (1974).

The Maryland Court of Appeals did not apply this principle to the present case. By suppressing a voluntary confession for an already corrected mistake, the Maryland Court of Appeals improperly elevated *Miranda* v. *Arizona*, 384 U. S. 436 (1966) and *Edwards* v. *Arizona*, 451 U. S. 477 (1981) above their status as prophylactic rules. The proper approach to this case is grounded in *Edwards*' prophylactic nature, and how this Court has treated similar situations in the context of a failure to warn under *Miranda*.

### I. As a prophylactic rule for *Miranda*'s prophylactic rule, expanding *Edwards* should be more difficult than expanding *Miranda*.

As this Court has said many times, *Miranda* v. *Arizona*, 384 U. S. 436 (1966) created a prophylactic rule. See, *e.g.*, *McNeil* v. *Wisconsin*, 501 U. S. 171, 176 (1991); *Michigan* v. *Harvey*, 494 U. S. 344, 350 (1990); *New York* v. *Quarles*, 467 U. S. 649, 654 (1984); *United States* v. *Patane*, 542 U. S. __, 159 L. Ed. 2d 667, 676, 124 S. Ct. 2620, 2627 (2004) (plurality opinion). *Miranda* thus strikes down perfectly voluntary confessions simply because officers did not follow its prophylactic rule. See *Dickerson* v. *United States*, 530 U. S. 428, 444 (2000). This has led to the Court recognizing several exceptions to *Miranda*'s general rule. See, *e.g.*, *Quarles*, 467 U. S.,

at 657 (public safety); *Harris* v. *New York*, 401 U. S. 222, 226 (1971) (use for impeachment).

The fact that *Dickerson* recognized that *Miranda* was a constitutional rule, see 530 U. S., at 444, does not undermine the decisions recognizing exceptions to *Miranda*. See *Patane*, 159 L. Ed. 2d, at 677, 124 S. Ct., at 2628 (plurality); *id.*, at 680, 124 S. Ct., at 2631 (Kennedy, J., concurring). Nor should *Dickerson*'s rule be considered to have undermined *Miranda*'s status as marking the outer edge of the Fifth Amendment. Although a majority of this Court has not labeled *Miranda* as a prophylactic rule since *Dickerson*, a majority recognizes *Miranda*'s outsider status with respect to the core of the Fifth Amendment. See *Chavez* v. *Martinez*, 538 U. S. 760, 771 (2003) (plurality); *id.*, at 778 (Souter, J., concurring) (characterizing *Miranda* as "outside the Fifth Amendment's core"). Since *Dickerson*, the main source of disagreement over the nature of *Miranda* is the issue of whether *Miranda* can only be violated with the admission of an improperly obtained confession, see *Patane*, 159 L. Ed. 2d, at 764-675, 124 S. Ct., at 2626 (plurality), or whether improper questioning may itself violate the Fifth Amendment even if no evidence is ever admitted. See *id.*, at 680, 124 S. Ct., at 2631 (Kennedy, J., concurring) (choosing to not resolve the question). *Miranda*'s status as a prophylactic rule does not turn on the answer to this question or *Dickerson*'s determination that *Miranda* is a constitutional rule. *Miranda* is prophylactic because its bright-line rule suppresses some voluntary confessions in order to protect the Fifth Amendment self-incrimination privilege. *Dickerson* does not change that fact, and the debate over whether improper questioning can itself violate the Fifth Amendment should not change *Miranda*'s prophylactic status.

*Miranda*, while a constitutional rule, is still malleable. When the costs of applying *Miranda* outweigh its bright-line exclusionary rule, this Court will not allow that decision to exclude an otherwise voluntary confession. See, *e.g.*, *Quarles*, 467 U. S., at 657; *Patane*, 159 L. Ed. 2d, at 676, 124 S. Ct., at



2627 (plurality). *Miranda* imposes necessary, but artificial constraints upon the courts and police. This Court found it difficult to apply the due process voluntariness test inside the interrogation room. See *Haynes* v. *Washington*, 373 U. S. 503, 515 (1963). *Miranda*'s main advantage is that it provides a bright-line "or at least brighter-line" rule, *Withrow* v. *Williams*, 507 U. S. 680, 694 (1993), for officers and the courts to follow. See *Berkemer* v. *McCarty*, 468 U. S. 420, 430 (1984). *Miranda* is best viewed as a necessary compromise which recognizes the inherent pressures of the interrogation room, see *Dickerson*, 530 U. S., at 444, and the difficulty of determining on a case-by-case basis the voluntariness of a confession obtained during custodial interrogation. See *Moran* v. *Burbine*, 475 U. S. 412, 433, n. 4 (1986) ("the [*Miranda*] decision . . . embodies a carefully crafted balance designed to protect *both* the defendant's and society's interests"). Like any compromise, *Miranda* changes as the conditions of its compromise change.

*Miranda* tilted this balance heavily in favor of accused criminals. See Caplan, Questioning *Miranda*, 38 Vand. L. Rev. 1417, 1469-1472 (1985). It overprotects the self-incrimination privilege by irrebutably presuming that a confession taken contrary to its rule is involuntary without regard to whether it is in fact involuntary. See *Oregon* v. *Elstad*, 470 U. S. 298, 304, 307, n. 1 (1985). Although there is some coercive pressure inherent in custodial interrogations, see *Miranda*, 384 U. S., at 467, these pressures are not so great that a knowing and intelligent waiver is foreclosed under these circumstances. See *id.*, at 535-536 (White, J., dissenting).

The various exceptions that the Court has created to *Miranda*'s presumption help to ameliorate its potentially harsh compromise. *Stare decisis* is a substantial reason for the continued validity of this most controversial decision. See *Dickerson*, 530 U. S., at 443. If *Miranda* were as inflexible as the Fifth Amendment privilege it protects, there would be a much stronger case for reconsidering it.

While *Miranda* is amenable to exceptions, extensions of its presumption are much more difficult to justify. *Miranda* itself is an extension of the Fifth Amendment privilege against self-incrimination. At this point, extending the privilege requires a " 'powerful showing' " that the need to protect the privilege or judicial enforcement of it outweighs the cost to society. See *Chavez*, 538 U. S., at 778 (Souter, J., concurring) (quoting *Miranda*, 384 U. S. at 515 (Harlan, J., dissenting)). Given *Miranda*'s considerable cost to society, it is appropriate that it should be easier to contract than expand.

*Edwards* v. *Arizona*, 451 U. S. 477 (1981) has a relationship to *Miranda* and the Fifth Amendment that makes it unique. *Edwards*' rule that all custodial interrogation must cease once the suspect clearly invokes his or her right to counsel, see *id.*, at 485, like *Miranda*, is not required by the Fifth Amendment. See *Davis* v. *United States*, 512 U. S. 452, 458 (1994). Instead, it establishes a "second layer of prophylaxis for the *Miranda* right to counsel," *McNeil*, 501 U. S., at 176, which is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Harvey*, 494 U. S., at 350; accord *Davis*, *supra*, at 458.

If *Miranda*'s prophylactic rule must be justified on a cost/benefit basis, then *Edwards* must be at least as susceptible to this approach. *Miranda*'s prophylactic is already a considerable extension of the Fifth Amendment. *Edwards*' extension of *Miranda* to create a second layer of protection is extraordinary. *Miranda* itself reflects a subtle balance between the needs of society and the rights of the accused. See *Moran*, 475 U. S., at 424. Adding layers to a constitutional edifice is a tricky business. "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added." *Douglas* v. *Jeannette*, 319 U. S. 157, 181 (1943) (Jackson, J., concurring in the result). Courts should be particularly careful in administering prophylaxis upon prophylaxis, or *Miranda*'s subtle balance may be fatally compromised.



*Davis* applies this principle by reiterating that the invocation of counsel necessary to trigger *Edwards* must be unambiguous. See 512 U. S., at 459. *Edwards* created a "rigid prophylactic rule." *Id.*, at 458 (internal quotation marks omitted). Any expansion of *Edwards*' rigid rule must be justified by the Court. See *id.*, at 459-460. While *Davis*' restrictive view of a successful invocation of counsel may hurt some criminal defendants, this was acceptable given *Edwards*' secondary role in protecting the Fifth Amendment privilege. "We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects . . . . [B]ut the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves." *Ibid. Edwards*' extra protections had to be balanced against society's need for effective law enforcement. See *id.*, at 461. Those needs outweighed expanding *Edwards* beyond unambiguously clear assertions of the right to counsel. See *ibid.*

A similar approach should govern this case. Proper analysis of this case closely parallels *Elstad*. While the circumstances are not precisely the same, the case for applying *Elstad*'s approach is at least as strong in the present case, and may even be stronger. See *infra*, at 21-22. *Edwards*' relatively rigid rule may serve an important purpose, but applying it to this case cannot be justified after a careful consideration of the costs and benefits of suppressing the incriminating statements.

## II. The rule of *Oregon* v. *Elstad* can apply to a violation of *Edwards* v. *Arizona*.

Even if Officer Reese's statement violated *Edwards* v. *Arizona*, 451 U. S. 477 (1981), Blake's subsequent incriminating statements should not be suppressed. *Oregon* v. *Elstad*, 470 U. S. 298 (1985) provides the analysis to reach the proper result in this case. Its limit on the reach of *Miranda* v. *Arizona*, 384 U. S. 436 (1966) applies to *Edwards* with equal strength. Although there are differences between the questioning

contrary to *Miranda* in *Elstad* and improper questioning under *Edwards*, there are many cases where *Elstad* can apply to keep an inadvertent impropriety under *Edwards* from needlessly tainting a subsequent voluntary waiver and confession.

*A. Elstad.*

*Elstad* demonstrates that *Miranda*'s prophylactic rule is applied with some flexibility. Like the present case, *Elstad* addresses a mistake by the police in their first encounter with the suspect. Officers Burke and McAllister went to Elstad's home with a warrant for his arrest for a burglary of a neighbor's home. See 470 U. S., at 300. McAllister asked Elstad's mother to step into the kitchen, where he explained that they had an arrest warrant for her son for the burglary. *Id.*, at 300-301. Officer Burke remained in the living room with Elstad. Burke later testified:

> "I sat down with Mr. Elstad and I asked him if he was aware of why Detective McAllister and myself were there to talk with him. He stated no, he had no idea why we were there. I then asked him if he knew a person by the name of Gross, and he said yes, he did, and also added that he heard that there was a robbery at the Gross house. And at that point I told Mr. Elstad that I felt he was involved in that, and he looked at me and stated, 'Yes, I was there.' " *Id.*, at 301.

Elstad was then driven to the Sheriff's headquarters and about one hour later was read the *Miranda* warnings for the first time. See *ibid.* Respondent said that he understood these rights and wished to talk to the officer. *Ibid.* He then confessed to the burglary. See *id.*, at 301-302.

Although Officer Burke's initial questioning of Elstad produced an incriminating statement that was arguably inadmissible under *Miranda*,[3] this Court saw no problem in admitting

3. The State conceded that Elstad was in custody, see *id.*, at 315, so the Court assumed that he was. The concession seems dubious.



the subsequent properly warned and waived statement. The Court noted that two metaphors dominated Elstad's argument in favor of suppression, " 'tainted fruit of the poisonous tree' " and "whether a confession can be truly voluntary once the 'cat is out of the bag.' " *Id.*, at 303-304. *Miranda* and the Fifth Amendment right it protects are fundamentally different from the Fourth Amendment exclusionary rule that Elstad's metaphors invoked. See *id.*, at 304. Since Elstad's argument "misconstrues the nature of the protections afforded by *Miranda* warnings and therefore misreads the consequences of police failure to supply them," his argument failed. See *ibid.*

The *Elstad* Court noted *Miranda*'s dramatic change to the law of confessions, as its prophylactic rule "required suppression of many statements that would have been admissible under traditional due process analysis . . . ." *Ibid.* The fact that *Miranda*'s irrebuttable presumption swept more broadly than the Fifth Amendment meant that "patently *voluntary* statements" were suppressed by its rule. *Id.*, at 307 (emphasis in original). Therefore, *Miranda* suppressed statements that could be used in other circumstances such as for impeaching witnesses. See *ibid.*; *Harris* v. *New York*, 401 U. S. 222, 226 (1971). This in turn supported the decision to not extend the rule of *Wong Sun* v. *United States*, 371 U. S. 471 (1963) to the situations found in *Harris* and *Michigan* v. *Tucker*, 417 U. S. 433, 447-448 (1974). See *Elstad*, 470 U. S., at 307-308.

*Tucker* was particularly illustrative of the relationship between *Wong Sun* and *Miranda*. That case addressed whether *Wong Sun* should be applied to suppress the testimony of a witness who was discovered through custodial interrogation without the benefit of *Miranda* warnings when the interrogation predated the *Miranda* decision. See 417 U. S., at 447-448. The Court held that the failure to warn Tucker "did not abridge respondent's constitutional privilege . . . but departed only from the prophylactic standards laid down by this Court in *Miranda* to safeguard that privilege." *Id.*, at 446. Admissibility was determined by a balancing of interests. It weighed society's

strong interest in admitting relevant, reliable evidence of guilt, see *id.*, at 450, against the minimal extra protection to the legitimate Fifth Amendment interests served by suppressing the witness' testimony. See *id.*, at 447-448. Since Tucker already had the protection of suppressing his own statements under *Miranda*, the balance of interests weighed against any additional exclusion. See *id.*, at 450-451.

Similar reasoning drove the *Elstad* decision.

> "We believe that this reasoning applies with equal force when the alleged 'fruit' of a noncoercive *Miranda* violation is neither a witness nor an article of evidence but the accused's own voluntary testimony. As in *Tucker*, the absence of any coercion or improper tactics undercuts the twin rationales—trustworthiness and deterrence—for a broader rule. Once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities." 470 U. S., at 308.

Since *Miranda* can inhibit people from voluntarily giving information to the police, it is restricted to custodial interrogation. See *id.*, at 309. While *Miranda* attempts to provide a clear guideline for the police, *Miranda*'s theory does not always govern its reality. Defining custody is difficult, and the police necessarily make errors while investigating crime. *Ibid.* These errors, however, "should not breed the same irredeemable consequences as police infringement of the Fifth Amendment itself." *Ibid.* Penalizing the state by invalidating a subsequent warned and voluntary statement for an earlier transgression "is an unwarranted extension of *Miranda* . . . ." *Ibid.* While *Miranda* properly suppresses the initial statement, the admissibility of the subsequent statement turns on whether the latter statement is knowing and voluntary. *Ibid.*

The Court then turned to whether the unwarned incriminating statement fatally tainted the subsequent confession. See *ibid.* The time between an actually coerced statement and a later statement is relevant to whether the later statement is



tainted by the coerced confession. See *id.*, at 310. Since a failure to receive *Miranda* warnings does not mean that the first statement was in fact coerced, this principle did not apply to Elstad's second statement. When a warned confession is "preceded by an unwarned, but clearly voluntary admission" the better rule is that there is no need for a clear break between the two statements. See *id.*, at 310-311. The subsequent *Miranda* warning "serves to cure the condition that rendered the unwarned statement inadmissible." *Id.*, at 311.

Allowing "the suspect's conviction that he has let the cat out of the bag," see *ibid.*, to taint the warned confession was inappropriate. Giving voluntary but unwarned statements this power could hamstring the police, as they could not obtain a suspect's cooperation even if actual coercion played no part in either the warned or unwarned statements. See *ibid.* "There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of the disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question . . . ." *Id.*, at 312. Determining what motivated a suspect to confess is difficult at best. See *id.*, at 313-314. Presuming compulsion from a prior unwarned statement was unwarranted. See *id.*, at 314.

*Elstad* was not a retreat from *Miranda*. See *id.*, at 317. However, it did recognize that flexibility was necessary when a warned statement was preceded by an unwarned one. See *id.*, at 318. In that case, the question is whether the second statement is voluntary after looking at the totality of the circumstances. See *ibid.*

*Elstad* has not diminished with age. *Dickerson* v. *United States*, 530 U. S. 428 (2000) did not invalidate *Elstad* in any way. See *United States* v. *Patane*, 542 U. S. __, 159 L. Ed. 2d 667, 679, 124 S. Ct. 2620, 2630 (2004) (plurality); *id.*, at 680, 124 S. Ct., at 2630-2631 (Kennedy, J., concurring). While *Elstad* cannot be invoked to cover up police abuse designed to

undermine the *Miranda* warnings, it is still undiminished. See *Missouri* v. *Seibert*, 542 U. S. __, 159 L. Ed. 2d 643, 657-658, 124 S. Ct. 2601, 2612-2613 (2004) (plurality) (distinguishing but not questioning *Elstad*); *id.*, at 659-660, 124 S. Ct., at 2615-2616 (Kennedy, J., concurring) ("*Elstad* was correct in its reasoning and its result").

*B. Elstad and Edwards.*

*Elstad*'s reasoning also applies to situations covered by *Edwards*. Just as *Miranda*'s status as a prophylactic rule was key to *Elstad*, the fact that *Edwards* is a second layer of prophylaxis is a compelling argument to adopt *Elstad* in the proper circumstances. *Elstad* is based on the notion that statements taken contrary to *Miranda* v. *Arizona*, 384 U. S. 436 (1966) can be voluntary, see *supra*, at 13, and that society should not be unduly penalized for a simple mistake in administering *Miranda*. See *supra*, at 14. This same situation applies in *Edwards*. *Edwards*' explicitly bright-line rule, see *Arizona* v. *Roberson*, 486 U. S. 675, 681 (1988), suppresses voluntary waivers and voluntary confessions. Interrogation after a request for counsel does not necessarily transform simple interrogation into coercion. *Edwards*, by forcing the police to cut off questioning as soon as the right to counsel is invoked, is intended to prevent police from "badgering" suspect's into waiving their rights, see *Michigan* v. *Harvey*, 494 U. S. 344, 350 (1990), which makes sure that any following statement "is not the result of coercive pressures." *Minnick* v. *Mississippi*, 498 U. S. 146, 151 (1990). It is not that every question after the invocation of counsel necessarily renders any statement coerced as a matter of fact. See *Solem* v. *Stumes*, 465 U. S. 638, 644 (1984). Rather, given the risks of badgering from prolonged questioning, and the difficulty of determining on a case-by-case basis how much questioning is in fact too much, the *Edwards* rule acts to "conserve judicial resources" by keeping the courts from having to make such difficult decisions. *Minnick*, *supra*, at 151.



Since *Miranda*'s relatively bright line also excludes voluntary confessions, see *supra*, at 7, and *Edwards* is simply an extension of *Miranda*, *Edwards* leads to even more voluntary confessions being suppressed than under an unadorned *Miranda* rule. Indeed, this Court has noted that *Edwards* excludes otherwise voluntary waivers. See *Harvey*, 494 U. S., at 353. The *Elstad* Court took great care to prevent a simple *Miranda* violation from having the same consequences as an actual Fifth Amendment violation. See 470 U. S., at 309. Since *Edwards* is even more attenuated from the Fifth Amendment than *Miranda*, this reasoning applies with even greater force in *Edwards* cases.

*Miranda* and *Edwards* are not identical. The typical *Miranda* violation contemplated by *Elstad* is custodial questioning without a warning. See *id.*, at 301. The "slippery" task of defining "custody" was invoked by the *Elstad* Court as one justification for its decision. See *id.*, at 309. Under *Elstad*, the subsequent *Miranda* warning helps to cure the initial failure to warn. See *id.*, at 310-311.

*Edwards* violations usually occur after the *Miranda* warnings are given. In a typical *Edwards* case, the officers will recite the *Miranda* warnings to the suspect in custody, who will then ask for counsel, with interrogation after the invocation of the right to counsel establishing the *Edwards* violation. See, *e.g.*, *Edwards*, 451 U. S., at 478-479; *Roberson*, 486 U. S., at 678. When a suspect invokes the right to counsel, reciting the *Miranda* warnings again does not "cure" the suspect's decision to invoke the right to counsel. Unless the suspect chooses to initiate a new conversation, see *Edwards*, *supra*, at 485, additional *Miranda* warnings are irrelevant.

The factual variation between *Miranda* and *Edwards* does not render *Elstad* irrelevant to *Edwards* cases. Although they may involve different facts, *Miranda* and *Edwards* cases operate under the same general principles. The factual differences between the two simply means that *Elstad* applies differently in *Edwards* cases than it does in *Miranda* cases.

*Elstad*'s main principle is that an officer's good faith mistake in administering *Miranda* does not forever taint all future encounters between the officers and the suspect. See *supra*, at 14. This principle can be applied to *Edwards* without doing violence to *Edwards*, *Miranda*, or the suspect's legitimate Fifth Amendment interests. Applying *Elstad*, asking a question after a suspect invokes the right to counsel should not weigh against the validity of the suspect's decision to initiate the conversation after the improper questioning is ended. Any admissions made in response to the improper questioning would be suppressed, but if the suspect chose to initiate speaking to the police at some later time, then the initial *Edwards* violation does not render any later decision to speak presumptively involuntary.

*Edwards*' underlying rationale is that officers must honor the suspect's request to have counsel present during interrogation. See *Davis* v. *United States*, 512 U. S. 452, 460 (1994). "*Edwards* is based on the supposition that suspects who assert their right to counsel are unlikely to waive that right voluntarily in subsequent interrogations." See *Harvey*, 494 U. S., at 350. Suppressing the responses to any improper questioning is enough protection for these interests. *Edwards* prohibits interrogation, see 451 U. S., at 484-485. Interrogation is primarily meant to elicit information from the suspect. If the police cannot use the information obtained from the improper interrogation, then the questioning has been frustrated.

*Edwards* recognizes the suspect's right to initiate the conversation after invoking the right to counsel. See 451 U. S., at 485. The fact that an officer may have mistakenly questioned the suspect after he or she invoked the right to counsel should not deprive the suspect of the ability to subsequently initiate a conversation with the officers and make a valid waiver of the rights to silence and counsel. To hold to the contrary would "imprison a man in his privileges and call it the Constitution." *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 280 (1942). If a *Miranda* violation does not taint a subsequent



knowing and intelligent waiver, see *Elstad*, 470 U. S., at 309, then questioning contrary to *Edwards* should not taint a subsequent decision to initiate a conversation with the police.

*Elstad* held that it would be an unwarranted extension of *Miranda* to hold that failure to administer the warnings irrevocably taints the suspect's ability to waive his rights for "some indeterminate period." *Ibid.* This distinguished the Fourth Amendment doctrine that there must be "intervening events [that] break the causal connection between the illegal arrest and the confession so that the confession is 'sufficiently an act of free will to purge the primary taint.' " *Taylor* v. *Alabama*, 457 U. S. 687, 690 (1982) (quoting *Brown* v. *Illinois*, 422 U. S. 590, 602 (1975)); accord *Elstad*, 470 U. S., at 306. This rationale can be adapted to fit *Edwards*' special needs.

Applying *Elstad* to *Edwards* does not mean that the state may characterize any statement from the suspect as an attempt to initiate speaking to the police. In *Edwards*, the police approached the suspect one day after he invoked the right to counsel and told him that they would question him again, after which Edwards agreed to talk to the police. See 451 U. S., at 479. Edwards' decision to talk was not a decision to initiate contact as this Court properly held. See *id.*, at 487. Applying the rule of *Elstad* to *Edwards* does not change this conclusion.

Determining whether the suspect initiated the conversation after an invocation is a question that courts and police applying *Edwards* must already address. See *Oregon* v. *Bradshaw*, 462 U. S. 1039 (1983). While a majority of the Court in *Bradshaw* could not agree on what constituted initiation, see *id.*, at 1048 (Powell, J., concurring), applying *Elstad* to *Edwards* does not add to a court's burden when addressing this issue. It simply recognizes that a prior *Edwards* violation has no bearing on whether the suspect did in fact subsequently initiate contact with the police.

*Edwards* does require some break between the first encounter and a decision by the suspect to initiate the conversation.

Therefore, before the suspect can initiate the conversation, it is necessary that any prior interrogation must cease. See *Christopher* v. *Florida*, 824 F. 2d 836, 845 (CA11 1987). Even though there was a one-hour delay between the unwarned custodial questioning and the subsequent valid waiver in *Elstad*, see 470 U. S., at 301, *Elstad* stated that no delay is required for a valid waiver after improper questioning. See *id.*, at 310-311. While this cannot apply to *Edwards*, the rest of *Elstad* fits with *Edwards*. Most importantly, the fact that interrogation must first stop does not import the "fruit of the poisonous tree" doctrine of *Wong Sun* v. *United States*, 371 U. S. 471, 488 (1963). *Edwards*, a "corollary to *Miranda*," see *Roberson*, 486 U. S., at 680, is no closer to this Fourth Amendment rule than is *Miranda*. The relatively substantial break between the Fourth Amendment violation and the confession in the *Wong Sun* line of cases is not necessary to establish the initiation of the dialog under *Elstad*. Instead, once the suspect asks for counsel, the necessary break between the initial encounter and the suspect's decision to initiate the conversation is the same whether or not the suspect is first improperly questioned under *Edwards*.

Applying *Elstad* will not impermissibly blur *Edwards*' bright line. Clarity is a goal advanced by *Miranda* as well as *Edwards*, see *id.*, at 681, and like *Miranda*, *Edwards* cannot be crystal clear. *Edwards* is predicated upon custody, which can be a difficult issue for police. See *Elstad*, 470 U. S., at 309. *Bradshaw* demonstrates that the standard for determining whether the suspect initiated the conversation is still undefined by this Court. If *Elstad* did not excessively blur *Miranda*'s somewhat bright line, then it will do no worse to *Edwards*'.

Applying *Elstad* to *Edwards* will allow more voluntary confessions to be admitted at trial. Given the states' compelling interest in utilizing such statements, see *Moran* v. *Burbine*, 475 U. S. 412, 426 (1986); *McNeil* v. *Wisconsin*, 501 U. S. 171, 181 (1991), and the minimal harm that their admission will do



to the interests protected by *Edwards* and *Miranda*, the balance weighs strongly in favor of applying *Elstad* to *Edwards*.

## III. Blake's *Miranda* waiver was knowing and voluntary.

Applying *Oregon* v. *Elstad*, 470 U. S. 298 (1985) to this case demonstrates that Blake's *Miranda* v. *Arizona*, 384 U. S. 436 (1966) waiver was knowing and voluntary. While there are differences between the two cases, the argument that the waiver in the present case is valid is as strong or stronger than it was in *Elstad*. Blake's encounter with the police demonstrates that an initial violation of *Edwards* v. *Arizona*, 451 U. S. 477 (1981) does not necessarily taint the suspect's subsequent decision to initiate conversation with the police, waive his *Miranda* rights, and incriminate himself.

The primary ways in which the present case differs from *Elstad* are the allegedly improper interrogation under *Edwards*, the lack of a prior unwarned incriminating statement, and the lack of personalized information about Blake's potential punishment. Officer Reese's statement to Blake, while potentially improper under *Edwards*, does not distinguish *Elstad* from the present case. Reese did not repeatedly interrogate Blake in some effort to break down his will to remain silent outside the presence of counsel. Instead, Reese's statement was immediately contradicted by his superior, Detective Johns, who effectively informed Blake that he did not have to respond to Reese's statement, and that no further questioning would take place. See *supra*, at 3.

Just as the subsequent *Miranda* warning in *Elstad* "serves to cure the condition that rendered the unwarned statement inadmissible," see 470 U. S., at 311, Detective Johns' statement neutralized any damage to Blake's rights caused by Officer Reese's statement. Detective Johns' immediate correction of Officer Reese's mistake was no mere empty promise. Interrogation was cut off and the encounter effectively ended before Blake could respond to Officer Reese's statement. Blake was

not questioned during the time between Detective Johns' statement and when Blake chose to initiate the conversation about 30 minutes later. See *supra*, at 3. Even then, Detective Johns did not immediately take up the conversation. Instead, he simply asked Blake if he wanted to talk to him. See *supra*, at 3. The discussion took place several minutes later in the interrogation room, and only after Blake was again given his *Miranda* warnings and waived his rights. See *supra*, at 3. Applying *Elstad*, Officer Reese's improper statement did not unconstitutionally taint Blake's decision to initiate the conversation, and waive his rights to silence and counsel.

This conclusion is reinforced by the second difference between *Elstad* and the present case, the fact that Blake never made a suppressible incriminating statement before he decided to waive his rights. While the *Elstad* Court held that letting *Miranda*'s "cat out of the bag" did not invalidate a *Miranda* waiver, see *id.*, at 313-314, this does not mean that the absence of unwarned incriminating statements is irrelevant to the validity of Blake's waiver. Even if the effects of a prior voluntary statement are "speculative and attenuated at best," *ibid.*, silence is less damaging to voluntariness than any prior incriminating statement, no matter how voluntary that prior statement may have been. While Elstad could not be expected to know whether his prior statement was inadmissible, see *id.*, at 316, Blake *knew* he could avoid incriminating himself by simply keeping silent. Although accurate knowledge of the admissibility of the prior statement was not necessary for Elstad's waiver to be valid, see *id.*, at 317, Blake was still in a *better* position to make a knowing and voluntary waiver than Elstad.

The lack of personalized information about Blake's eligibility for capital punishment does not change the analysis of his waiver. Improper information does not necessarily invalidate a waiver of rights. While *Miranda* does forbid police from using tactics "to induce a confession out of trickery," 384 U. S., at 453, the Constitution does not require that the suspect



be perfectly informed before making a valid waiver. As noted, "[t]his Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." *Elstad*, 470 U. S., at 316. Similarly, the police are not required to inform the suspect about the scope of the questioning, see *Colorado* v. *Spring*, 479 U. S. 564, 577 (1987), or inform him that counsel wishes to contact him. See *Moran* v. *Burbine*, 475 U. S. 412, 422-423 (1986).

Certain forms of misinformation will invalidate a waiver. Misrepresenting that a failure to cooperate with authorities will cause the suspect to lose financial aid, or that a friend will lose a job as a police officer if the suspect does not cooperate invalidates the waiver. See *Spring*, 479 U. S., at 576, n. 8 (citing *Lynum* v. *Illinois*, 372 U. S. 528 (1963); *Spano* v. *New York*, 360 U. S. 315, 323 (1959)). *Miranda* condemned as trickery the police tactic of using rigged lineups in which the defendant is falsely identified as the guilty party. See 384 U. S., at 453. That type of intentional deception is not present here. What is unconstitutional in these cases is deception about the interrogation itself, either by falsely stating that silence would be punished, or in the *Miranda* example, that admitting guilt effectively has no further consequence.

The incomplete information in the charging papers is not this form of trickery. There is no evidence that the statement of the maximum sentence in the charging papers was an attempt to trick Blake into confessing. The charging paper is computer generated, and it states the maximum penalty allowed for that crime under the law. See App. to Pet. for Cert. 39a. Since the penalty entries are not set to the individual defendant at this stage of the proceedings, see *ibid.*, Blake's charging paper indicated death as a possible sentence. This is in fact the maximum sentence for the crime under Maryland law. Although this could not apply to Blake, there was no deception intended to trick a confession out of Blake.

Blake was not deceived about the consequences of his decision to speak. Although his self-serving testimony indi-

cates that the threat of capital punishment may have partially motivated him to speak, see *Blake* v. *State*, 849 A. 2d 410, 414 (Md. 2004), it is no less true that Maryland never deceived Blake about the consequences of his decision to speak. He knew that he had a right to remain silent and a right to counsel. See *supra*, at 3. He also knew the fact that his accomplice had implicated him, a fact that also motivated him to speak for himself. See Pet. for Cert 5. Nothing more is necessary for a knowing and voluntary waiver.

"Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statement to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." *Moran*, 475 U. S., at 422-423. This is what happened to Blake. He was well informed of his rights and the consequence of speaking. No one coerced him into any action. Neither Officer Reese's corrected mistake nor the operation of a computer program changes these circumstances or the validity of Blake's waiver.

## CONCLUSION

The decision of the Maryland Court of Appeals should be reversed.

June, 2005

Respectfully submitted,

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